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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 80-1942

A. R. JAGO, et al.,

Petitioners,

vs.

GEORGE D. VAN CUREN,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER A STATE PRACTICE OF RESCINDING PAROLE ONLY UPON A FINDING OF EITHER INTERIM MISCONDUCT OR INABILITY TO IMPLEMENT A RELEASE PLAN CREATES AN INTEREST PROTECTED BY THE DUE PROCESS CLAUSE.

2. WHETHER AN INMATE'S PETITION FOR HABEAS CORPUS RELIEF FROM A DECISION RESCINDING PAROLE WITHOUT DUE PROCESS IS RENDERED MOOT BY HIS PLACEMENT ON CONDITIONAL PAROLE DURING APPELLATE REVIEW.

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STATEMENT OF THE CASE

To correct factual inaccuracies and omissions in the Petition, this brief presentation is submitted pursuant to Sup. Ct. R. 34(2).

Ohio grants parole by setting an "on or after" date for release from incarceration and then leaving to a field investigator responsibility for developing an approved parole plan and establishing the actual release date (Kowalski Dep. at 43; Coomer Dep. at 22-24).* The time needed for investigation varies from a few weeks to several months (Shoemaker Dep. at 31, Coomer Dep. at 42), and the "on or after" date is the earliest possible date and applicable to pro forma situations (Shoemaker Dep. at 14-15, 51-53; Griffith Dep. at 10; Snyder Dep. at 81).

After his parole interview, Mr. Van Curen was given a half-sheet form that stated:

> You have been paroled; effective, on or after April 23, 1974, when arranged: by the Division of Parole.

(A-24).** Outside the interview room, a sign read "If you made parole, report to the parole officer," which Mr. Van Curen did. On a posted list headed "Results of the April 17, 1974 Parole Board," Mr. Van Curen was listed under the heading, "POA [parole on or after] April 23, 1974" (A-25). On April 17, 1974, Mr. Van Curen signed, and the Institutional Parole Officer countersigned as a witness, a "Statement of Parole Agreement" (A-26). The statement began:

> The Members of the Parole Board have agreed that you have earned the opportunity of parole and eventually a final release from your present conviction. The Parole Board is therefore ordering a Parole Release in your case.

(A-26). According to a pamphlet distributed to each incoming prisoner, entitled "You and the Review Process," the answer to the hypothetical question of "If I have a successful review and the Board grants me a parole, how long before I

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* "Dep." refers to depositions filed in the Supreme Court of Ohio and used throughout the lower federal proceedings.

** "A" refers to the joint appendix filed July 14, 1980, in the Sixth Circuit.

am released?" is "within 30 to 60 days" (A-31).

Mr. Van Curen then attended and completed pre-release classes (Coomer Dep. at 19; Snyder Dep. at 38). He was taken to the prison tailor and measured for a civilian suit of clothes (Coomer Dep. at 17-18, 66-67; Snyder Dep. at 38). The Institutional Parole Officer sent Mr. Van Curen's proposed parole plan to the field investigator (Coomer Dep. at 16-17, 48-50).

Prior to actual release, a parole may be rescinded as "the result of something that occurred between the original parole hearing and subsequent hearing" (Shoemaker Dep. at 65). The practice in Ohio is to rescind parole for institutional misconduct or a problem with developing the parole plan (Coomer Dep. at 32-33, 43-44). Less than one percent of paroles are rescinded annually in Ohio (Snyder Dep. at 73-74; 112-13; Shoemaker Dep. at 14).

Six days after its parole grant, the Board summarily rescinded Mr. Van Curen's parole due to "information that technical matters pertaining to this case should be more fully explored" (A-27). No field investigator's report had been or was ever submitted on the proposed parole plan (Coomer Dep. at 22-24). Mr. Van Curen had not engaged in any improper institutional conduct during the six days (Snyder Dep. at 14).

Prior to the rescission, a deluge of newspaper and broadcast journalists had inquired about the parole grant (Snyder Dep. at 32), and the board chairman related to the other board members that the "community climate appeared to be very hostile to the Board's decision" (Shoemaker Dep. at 27). Adverse publicity was contained in the parole board's file, and one factor in granting parole is the public's reaction: "[I]f the Parole Board gets out of step with public opinion, the future of the Parole Board will be quite hazardous" (Snyder Dep. at 86).

The two grounds for rescission on which the parole authorities now rely involved factual discrepancies. Mr. Van Curen supposedly misrepresented whether six or one million dollars had been embezzled; though, the record is clear that the total loss was over a million dollars (Snyder Dep. at 51, Kowalski Dep. at 57). Mr. Van Curen also listed as a half-brother under whom he would live with his former lover; however, he had submitted a new and recognized place of residence to the Institutional Parole Officer, which the Officer

accepted (Coomer Dep. at 38-39). Mr. Van Curen's family treated the former lover as a half-brother and their relationship was known to Cleveland authorities (Van Curen Dep. at 59). That listing was encouraged by both a prison priest and pscyhologist who advised him to retain the half-brother label to avoid sexual harassment within the institution prior to his grant of parole (Van Curen Dep. at 70-72).

ARGUMENT IN OPPOSITION TO GRANTING CERTIORARI

1. The Sixth Circuit Followed Controlling Precedent From This Court.

Three legal principles have been established by this Court to govern the due process ramifications at bar. First, a state's custom or practice may create a protectable interest notwithstanding the absence of an express statutory provision. Second, a prisoner's claim must surpass the mere desire implicit to a parole system and amount instead to a justifiable expectation of parole. Third, the parole decision at issue must be one for which due process is viable; consequently, a retrospective factual deliberation must be done with notice and an opportunity to be heard while a purely subjective prediction may be done summarily. Each of these principles are clearly satisfied in this case.

A. State Custom or Practice May Create A Protectable Interest.

The argument petitioner makes concerning Ohio's statutory parole framework is off the constitutional mark because due process interests may be created by state custom or practice. Perry v. Sindermann, 408 U.S. 593, 601, (1972). Where a state establishes "rules or mutually explicit understandings," Perry, 408 U.S. at 601, regarding a benefit, a due process interest can be created even absent statutory expression.

The federal courts are not in conflict on this issue. See, e.g., Mitchell v. Hicks, 614 F.2d 1016, 1019 (5th Cir. 1980); Cofone v. Manson, 594 F.2d 934, 939 (2d Cir. 1979); Arsberry v. Sielaff, 586 F.2d 37, 46 (7th Cir. 1978).

Ohio has created precisely such an interest through both its nearly unvariable practice of effectuating parole grants and its use of rescission only for cause. The state has buttressed that practice through its parole agreement, pamphlet, and process, all of which combine here to produce a mutually explicit and undeniable understanding.

B. Mr. Van Curen Had Been Granted A Benefit He Could Justifiably Anticipate Receiving.

The facts demonstrate that Mr. Van Curen did not just desire parole in the same undifferentiated way all prisoners do. He did not expect parole simply because a parole system implicitly holds out that prospect. Thus, unlike Greenholtz v.Nebraska Inmates, 442 U.S. 1, 11 (1979), Mr. Van Curen had "more than the mere hope that the benefit will be obtained," he had documents countersigned by the authorities, official minutes, and a half-sheet, and completion of the process from the tailor's measurements to pre-release classes, needed to implement a parole grant.

His expectation for parole was, therefore, rooted in Ohio's representations and actions. He had attained a status that Ohio held out as a special one to be given only to deserving inmates. See "You and The Review Process," A-28-32. Mr. Van Curen could justifiably rely on the documentation, interviews, and efforts undertaken by him and the authorities to implement the parole grant.

This case differs, therefore, from Connecticut Bd. of Pardons v. Dumschat, No. 79-1997 (U.S., orally argued Feb. 24, 1980), which raised the issue of whether the existence of statistically frequent accelerations of parole operates to create a protected interest. Here, an individual granted a status asks only that it not be taken away without at least some notice and an opportunity to be heard. In Dumschat, the argument raised in Greenholtz is renewed: whether mere existence of a system creates a protected interest for all inmates.

C. The Decision To Rescind Parole Is Factually Retrospective, In Contrast To The Decision To Grant Parole, And Is Thus Amenable To Due Process.

Two separate decisions were made by the Ohio parole board. First, it summarily rescinded on April 23, 1974, Mr. Van Curen's parole. Then, at a later and different hearing, it decided on June 20, 1974, not to grant parole. (Petition at 5-6.)

The decision to deny parole "is necessarily subjective in part and predictive in part" with "very broad discretion in the Board." Greenholtz, 442 U.S. at 13. But, the decision to rescind parole in Ohio "involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of "institution rules or failed to present a proper release plan." Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

However amenable to due process the totally discretionary exercise of granting power may be, the exercise of rescinding power is too intrisically based on an intervening occurrence or information to be totally discretionary. Ohio must provide the process that is due once it grants parole.

2. Conditional Parole Represents A Restraint By Government That Is Subject To Habeas Corpus Relief.

At oral argument on this matter before the Sixth Circuit Court of Appeals, the Court was informed that Mr. Van Curen was conditionally released on parole. (Petitioner's Appendix, 6A). Petitioner then and before this Court asserts that Van Curen's case is therefore moot due solely to respondent's parole status relying upon this Court's decision in Weinstein v. Bradford, 423 U.S. 147 (1975). The Sixth Circuit replied to petitioner's argument stating:

> [T]he fact which created mootness [in Weinstein v. Bradford] was not the inmate's release. Rather, the case became moot when this status 'ripened into a complete release from supervision...' Id. at 148. Since Van Curen remains under the supervision of the OAPA the present case is not controlled by Weinstein. We conclude that mootness has not been established and that the important constitutional issue presented by this appeal should be decided at this time. (Petitioner's Appendix, 6A).

The Court of Appeals again considered petitioner's assertion of mootness in denying petitioner's request for rehearing en banc. (Petitioner's Appendix, 17A).

Mr. Van Curen has not met the threshold requirement of a final unconditional release from parole that this Court found in Weinstein made it "plain that respondent can have no interest in the procedures followed by petitioners in granting parole." Weinstein, 423 U.S. at 148. Respondent Van Curen's interest in petitioner's parole procedure is a consuming one, he presently lives under the daily supervision of the State of Ohio, a supervision continually reinforced by the significant and special restraints placed upon his liberty while on parole. (Respondent's Affidavit In Support of Request To Proceed in Forma Pauperis).

In Jones v. Cunningham, 371 U.S. 236, 252 (1963), this Court recognized the significant effect parole conditions placed upon one's liberty in finding that parole did moot a petition for a writ of habeas corpus. In ruling a parolee's habeas action not to be moot against the exact question of mootness the petitioner here presents, the United States District Court in Hutton v. Heggie, 454 F.Supp. 870, 873 (D.Col. 1978), found the Jones

court's explanation of the rationale historically inherent in the habeas writ to be persuasive:

> Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose--the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

Jones, 371 U.S. at 243.

Petitioner's reliance upon the "issue capable of repetion, yet evading review" test first enunciated by this Court in Southern Pacific Terminal Co. v. I.C.C., 299 U.S. 498 (1911), is therefore misplaced. Respondent's personal stake in the outcome of this action was clearly recognized by the Court in Jones, supra, and is not comparable to the factual setting present in Weinstein, supra. Respondent Van Curen's ongoing personal stake in his due process challenge to the State of Ohio which the Sixth Circuit has confronted is further evidenced by this Court's recognition that 35-45% of all paroles are revoked. Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

In petitioner's final assertion of mootness, petitioner states "Van Curen has obtained his relief." (Petition, 11). Respondent Van Curen can never gain all the relief entitled him. A due process hearing in 1974 may have resulted in Van Curen's release on parole six years before his ultimate parole date.

The relief Mr. Van Curen is entitled to on a writ of habeas corpus in these circumstances is immediate release from parole. Hutton, 454 F.Supp. at 875. Federal courts have the "power to fashion appropriate relief other than immediate release" from incarceration upon a habeas corpus petition. Peyton v. Rowe, 391 U.S. 54, 67 (1968). Petitioners request that this Court find Van Curen's case moot thereby implicitly suggests that all the state of Ohio need do in future habeas challenges to the parole system is wait until the last stage of appeal before ordering parole for the habeas inmate and thereby successfully evade review. Based upon the importance of the issue and fairness to the respondent, mootness is highly improper to invoke. Recognizing the ultimate importance of the decision for the State of Ohio, petitioner requested a stay of the Sixth Circuit decision pending this Court's decision. (Petitioner's Appendix 16 A). The effect of that stay was to block the very relief sought: release from the restraint of conditional parole.

CONCLUSION

Rescission of parole under the circumstances at bar constitutes the deprivation of a benefit that the state had provided. There is no conflict in the federal courts and no departure from this Court's precedent in the Sixth Circuit's holding that Ohio has adopted a custom and practice of rescinding parole only for cause. Mr. Van Curen had progressed beyond the level of other prisoners, he had even been measured for his civilian suit. Consequently, he had a right to some notice and opportunity to be heard.

Were the Sixth Circuit affirmed and the stay lifted, Mr. Van Curen would immediately seek release from parole. That release is the appropriate remedy under habeas corpus in the situation presented by this case. Far from being moot, that release is one in which Mr. Van Curen has an ongoing personal stake: he wants to have and should be provided unconditional liberty.

For these and the foregoing reasons, the petition should be denied.

Respectfully submitted,

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RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

Respondent George D. Van Curen, by and through his attorneys, moves this Court, pursuant to Sup. Ct. R. 46(1), for leave to proceed in forma pauperis for the reasons stated in the attached affidavit. Respondent sought and was granted leave to so proceed in the federal appellate and district courts below, in this Court in Misc. No. 78-5419, and in the Supreme Court of Ohio.

Respectfully submitted,

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RESPONDENT'S AFFIDAVIT IN SUPPORT
OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF OHIO
COUNTY OF CUYAHOGA, SS:

I, George D. Van Curen, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to pay costs or fees:

1. I am the respondent in the above-captioned case.

2. I am on parole upon a two-year term until April 11, 1982, even though in Ohio the term for parole upon convictions for others than homicide is generally one year, under the following conditions:

(a) a written travel permit is required for out-of-state or more than 24 hours away trips and for visits back to the prison

(permission has been denied for one such trip), which permit local law enforcement authorities must check-off on at the destination;

(b) permission must be given to change residence or jobs;

(c) no checking account, according to the District Supervisor of the Ohio Adult Parole Authority may be maintained;

(d) a monthly visit to my parole office for an interview and report must be made; and

(e) any misconduct during this term may lead to revocation.

3. I have no substantial assets and a savings account with only Five Dollars ($5.00) in it that must be maintained so that I can cash my paycheck.

4. I am a cleaner full-time at Lakewood High School and take home approximately One Hundred Fifty Dollars ($150) a week.

5. I had an offer of an out-of-state job for a higher salary but did not apply to the Parole Authority for permission because the job involved working on films the Authority would surely find morally objectionable.

6. I have been unable to find a higher paid job that the Authority would deem suitable.

7. For my job I must have a car and owe the credit union Fifteen Hundred Dollars ($1,500) on it.

8. I pay a monthly rental of Two Hundred Dollars ($200) for an apartment.

9. I am responsible for my own support and pay for gasoline, food, insurance, clothing, and other necessities.

10. The United States Treasury Department has a Nine Hundred Eighty One Thousand Dollars ($981,000) tax lien on me and took my refund check this year in partial payment.

11. Because of my financial situation, I am unable to pay the costs or fees for pursuing this case.

12. I am unable to post security either.

13. I believe I am entitled to the redress approved by the Sixth Circuit because parole authorities should not be allowed to

take back in summary fashion a parole release date I justifiably relied on using, particularly when their action was taken based on facts that I could have cleared up given the chance to be heard.

FURTHER AFFIANT SAITH NOT.

George D Van Curen

George D. Van Curen

Sworn to and subscribed before me this 11th day of June, 1981.

Louis A. Jacobs

NOTARY PUBLIC

LOUIS A. JACOBS, Attorney-At-Law
NOTARY PUBLIC — STATE OF OHIO
My Commission has no expiration date.
Section 147.03 R.C.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Proceed In Forma Pauperis and Affidavit in Support has been deposited in a United States Postal Service mailbox, in an envelope with first-class postage prepaid, addressed to Dennis L. Sipe, Counsel of Record for Petitioner, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio, 43215, this 11th day of June, 1981. I further certify that all parties required to be served have been served by mailing that copy to their counsel as indicated above.

Louis A. Jacobs

LOUIS A. JACOBS
Counsel of Record